Supreme Court, U.S.
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No. 10-952

In the

Supreme Court of the United States

BLUE MOVIES, INC. D/B/A/ LOVE BOUTIQUE, ET AL.,
Petitioners,

v.

LOUISVILLE/JEFFERSON COUNTY
METRO GOVERNMENT,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Kentucky

PETITION FOR WRIT OF CERTIORARI AND VOLUME 1 OF APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Kentucky Supreme Court's Opinion violated the Supremacy Clause and the Fourteenth Amendment's incorporation of the First Amendment by interpreting and applying state constitutional law in a manner that is more restrictive than that which is guaranteed by the First Amendment of the United States Constitution, as demonstrated by the Kentucky Supreme Court's omission of the "proportionality" analysis when considering secondary effects challenges, an analysis which is mandated by Justice Kennedy's concurring – and controlling – opinion in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), and an analysis which has been adopted and applied in a significantly more demanding and speech-protective manner by several recent opinions by the United States courts of appeals?

2. Whether the Kentucky Supreme Court's Opinion suggesting that the Twenty-First Amendment confers an added presumption of validity in favor of alcohol regulations, which thereby trumps Petitioners' interests despite the otherwise invalid restrictions on Petitioners' First Amendment protections, is in conflict with relevant decisions of this Court, including *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996)?

PARTIES TO THE PROCEEDINGS BELOW

The Petitioners are:

(1) Blue Movies, Inc. d/b/a *Love Boutique*;

(2) Taylor Boulevard Theatre, Inc., d/b/a *Erotic Touch*;

(3) Kentucky Restaurant Concepts, Inc. d/b/a *PT's Showclub*;

(4) Taylor Boulevard Theatre, Inc., d/b/a *Deja Vu*; and

(5) Win Place and Show Bar, Inc., d/b/a *Win, Place & Show Bar*.

Respondent is the Louisville/Jefferson County Metro Government.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners make the following disclosures:

(1) Blue Movies, Inc. d/b/a *Love Boutique* is 80% owned by Imagination Corporation, which is 100% owned by a personal trust. Neither Imagination Corporation nor any of the other owners of Blue Movies, Inc.'s stocks are publicly held companies.

(2) Taylor Boulevard Theatre, Inc., d/b/a *Erotic Touch* is 100% owned by a personal trust. Taylor Boulevard has no parent corporations, and no public company owns more than ten percent of Taylor Boulevard's stock.

(3) Kentucky Restaurant Concepts, Inc. d/b/a *PT's Showclub* is owned by VCG Holding Company, a publicly held company. No other publicly held company owns more than ten percent of Kentucky Restaurant Concepts, Inc.'s or VCG Holding Company's stock.

(4) Taylor Boulevard Theatre, Inc., d/b/a *Deja Vu* is 100% owned by a personal trust. Taylor Boulevard has no parent corporations, and no public company owns more than ten percent of Taylor Boulevard's stock.

(5) Win Place and Show Bar, Inc., d/b/a *Win, Place & Show Bar* has no parent corporations, and no public company owns more than ten percent of Win Place and Show Bar, Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Blue Movies, Inc. d/b/a Love Boutique, et al., respectfully pray that a writ of certiorari be issued to review the Opinion of the Kentucky Supreme Court entered in this proceeding on April 22, 2010.

OPINIONS BELOW

The Opinion of the Kentucky Supreme Court is reported as *Blue Movies, Inc. v. Louisville/Jefferson County Metro Government*, 317 S.W.3d 23 (Ky. 2010). App. 1-39. The August 26, 2010 Order of that court denying a Petition for Rehearing is unreported and is found at App. 166-67. The October 5, 2007 Opinion of the Kentucky Court of Appeals, upholding all of the challenged provisions, is also unreported and appears at App. 40-139. The December 14, 2004 Opinion and Order of the Jefferson Circuit Court granting a temporary injunction to Petitioners as to two challenged provisions of the relevant ordinance, and granting summary judgment to Respondent as to all other challenged provisions, is reproduced at App. 140-65.

JURISDICTION

The Kentucky Supreme Court's Opinion was issued on April 22, 2010. App. 1-39. The Kentucky Supreme Court denied Petitioners' timely filed Petition for Rehearing by Order dated August 26, 2010. App. 166-67. On November 12, 2010, Petitioners timely filed an Application for Extension of Time to File Petition for Writ of Certiorari. This Court, per Justice Kagan, granted the requested extension on November 16, 2010, thereby extending the time for filing the instant

Petition for Writ of Certiorari to and including January 23, 2011. Petitioners are filing this Petition for Writ of Certiorari on or before the extended deadline of January 23, 2011. This Court therefore has jurisdiction to review the ruling of the Kentucky Supreme Court pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

The text of the First Amendment to the United States Constitution is found at App. 212, the text of the Fourteenth Amendment is reproduced at App. 212-14, and the text of the Twenty-First Amendment is reproduced at App. 214. Chapter 111 of the Louisville/Jefferson County Code of Ordinances (the regulatory scheme that was challenged by Petitioners below) appears at App. 168-211.

STATEMENT OF THE CASE

Petitioners are various businesses located in and around the Louisville/Jefferson County, Kentucky area, which are either: (a) retail facilities that present, sell, and rent to the consenting adult public a variety of presumptively protected sexually explicit but non-obscene expressive materials and/or (b) liquor-licensed establishments (except for Taylor Boulevard Theatre, Inc., d/b/a *Deja Vu*, which does not have a liquor license), which present to the consenting adult public a variety of female exotic dance entertainment where entertainers perform fully clothed, "topless," and/or fully nude. App. 3.

Respondent Louisville/Jefferson County Metropolitan Government ("Metro") is the

governmental and law-making body that was formed in January 2003 when the City of Louisville, Kentucky and Jefferson County, Kentucky merged into one governmental entity.

On March 1, 2004, Metro enacted Ordinance No. 21, Series 2004, which amended Chapter 111 of the Metro Government Code of Ordinances ("Chapter 111," or simply the "Ordinance," a copy of which is found at App. 168-211). Among other things, the Ordinance: (1) requires that the "principal owners" or "operators" of defined "adult entertainment establishments" must obtain a license from the Director of Inspection, Permits and Licenses (the "Director") as a condition to operating, and that all employees of such establishments must also obtain a license prior to working in such establishments (§§ 111.36-111.38 and 111.42-111.43); (2) provides for the denial of license applications and for the suspension and revocation of licenses for numerous reasons (§ 111.43); (3) requires a $1,000.00 annual licensing fee, presumably for the "principal owners" and "operators," and a $25.00 per year fee for employee licenses (§§ 111.41 and 111.42(B)); (4) precludes any form of live nude entertainment, or even "topless" dancing, and requires entertainers to wear at all times at least "pasties and g-strings" (§ 111.35(A)); (5) precludes establishments presenting such dancing from having a liquor license (§ 111.3); (6) prohibits anyone under the age of eighteen from entering such establishments, even though no true live "adult" entertainment is presented as a result of the nudity prohibitions (§ 111.17); (7) precludes licensing of individuals convicted of "specified criminal activities," which include, for example, simple drug possession offenses (§§ 111.02; 111.36(B)(2)(b) and (6); 111.38(A)(4); and 111.42(B));

(8) prohibits such establishments from operating between 1:00 a.m. and 9:00 a.m. on any day (§ 111.18) (referred to as the "hours of operation" restrictions); (9) prohibits entertainers, even while "semi-nude" (*i.e.*, while clothed), from receiving any pay or gratuity directly from a patron (§ 111.35(C)), and further requires that such entertainers remain at least six feet away from any patron and perform only on a fixed stage at least eighteen inches above the floor (§ 111.35(B)); and (10) provides for penalties for violating the Ordinance, including license suspension and/or revocation, civil fines, misdemeanor conviction (punishable by a fine of $250.00 to $500.00, or imprisonment not to exceed ninety days, or both), and "remedial civil actions" brought by the licensing authorities (§ 111.99). App. 168-211.

On March 5, 2004, Petitioners Kentucky Restaurant Concepts Inc., d/b/a PT's ("PT's") and Blue Movies, Inc., d/b/a Love Boutique ("Blue Movies") filed suit in Jefferson Circuit Court challenging the Ordinance on numerous constitutional grounds and seeking a temporary restraining order and preliminary and permanent injunctive relief. App. 141. In June and July of 2004, the various other establishments which are Petitioners here were granted permission to intervene as plaintiffs in the trial court. In the Intervening Plaintiffs' Verified Complaint, Petitioners raised the federal questions sought to be reviewed here, alleging that the Ordinance is "unconstitutional, both facially and as applied, and is in violation of [Petitioners'] First, Fifth, Ninth, and Fourteenth Amendment rights under the United States Constitution and their corollary rights under the Kentucky Constitution." App. 229-33, 216-17. Indeed, as will be shown in this Petition, even when making

state law or state constitutional claims, Petitioners rested their arguments on federal authority – and the state courts analyzed these claims accordingly – because, as is now essentially black letter law, state constitutional protections cannot afford less protections that those guaranteed by corollary federal constitutional rights. *See, e.g.*, App. 266.[1]

At the commencement of litigation and following oral argument on the date of filing, the circuit court entered a restraining order enjoining Metro from enforcing the Ordinance. Thereafter, Metro removed the case to federal court and Petitioners then filed a motion to remand, which was granted by the federal court. App. 141. Following the remand, Metro then filed a motion for summary judgment and Petitioners filed a supplemental brief in support of their motion for temporary injunction. App. 141.

On December 14, 2004, the circuit court entered a final and appealable Opinion and Order granting Petitioners' motion for temporary injunction with regard to § 111.36(B)(2)(b) (the requirement of the disclosure of principal owners) and § 111.35(D) (the "no touch" provision); and granting Metro's motion for summary judgment as to all issues except for those

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[1] Of course, state constitutional protections can afford greater protections than their federal counterparts, and Petitioners sought to invoke such protections below by additionally referencing and arguing for such additional protections under the Kentucky Constitution. *See, e.g.* App. 380-81 But the federal questions, such as those involving the First Amendment's protections, always provided a minimum guarantee of protections and, as is evident from the references herein, Petitioners invoked these federal issues throughout the proceedings below.

two sections. App. 140-65. The circuit court addressed both the state and federal issues raised by Petitioners by analyzing and applying the proper federal doctrines for such constitutional review. *See, e.g.*, App. 144 ("the standard of review required to determine the state and federal constitutionality of the Ordinance, given its underlying stated justification to decrease secondary effects and not speech, is the test set forth in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)"); App. 151 ("federal courts apply the *O'Brien* test to determine a disclosure provision's constitutionality"); App. 158-59, 161-62 (applying federal case law and analysis to Petitioners' challenges regarding secondary effects and time, place, and manner restrictions). The circuit court granted virtually complete summary judgment to Respondent Metro: 1) without permitting the completion of discovery on matters which the court acknowledged, at least at one point, were relevant to the issues in the case; 2) without conducting any evidentiary hearing; 3) without permitting oral argument on any of the then-pending motions; and 4) after intentionally, and with the consent of the parties, "sanitizing" certain evidence from the record on critical factual issues which the parties acknowledged were not then pending before the court.

Petitioners all timely filed Notices of Appeal in the Kentucky Court of Appeals, and Metro filed a cross-appeal with regard to the rulings concerning §§ 111.36(B)(2)(b) and 111.35(D). Upon application, the Court of Appeals issued a stay pending appeal. Petitioners again raised the federal questions sought for review here. *See, e.g.*, App. 274-76, 292-300, 321-26 (analyzing prior restraints, secondary effects doctrine, time, place, and manner restrictions, and general free

speech principles under minimum federal constitutional principles, but arguing for even greater protection under Kentucky constitutional interpretation).

On October 5, 2007, the Kentucky Court of Appeals issued an Opinion Affirming in Part and Reversing in Part. App. 40-139. Applying a *de novo* standard of review, the Court of Appeals essentially ruled in favor of Metro on every possible issue. The Court of Appeals affirmed the circuit court's judgment on all issues raised by Petitioners and reversed the circuit court on both issues raised by Metro in their cross-appeal, finding all challenged provisions of the Ordinance, including both the disclosure of shareholders provision (§ 111.36(B)(2)(b)) and the "no-touching" provision (§ 111.35(D)), to be constitutionally sound. App. 40-139. Although again largely analyzing Kentucky constitutional matters, the Court of Appeals nonetheless analyzed Petitioners' claims under federal case law, noting that the United States Constitution and the federal cases interpreting it provide a floor of constitutional protections that must be met. *See generally* App. 62-103, 120-38 (relying, almost exclusively, on federal constitutional principles and applying federal case law to all of the claims presented here); *see also* App. 64-65 (specifically noting that "Kentucky courts, in other cases, have specifically held that the freedom of speech provisions in the Kentucky Constitution are similar to that of the United States Constitution," holding that "free speech and free expression protections under the Kentucky Constitution are consistent with those in the United States Constitution," and thereby rejecting Petitioners' arguments relying on "a higher level of protection

under the Kentucky Constitution beyond that granted by the First Amendment.").

Petitioners then sought discretionary review in the Kentucky Supreme Court, again preserving the federal issues which are the subject of this Petition. *See, e.g.*, App. 338, 346 (raising issues of whether protections on expression and other liberties in Kentucky Constitution are more stringent or only equal to the minimum protections guaranteed by the federal constitution and the case law interpreting the First Amendment). On April 16, 2008, the Kentucky Supreme Court granted discretionary review. App. 349-50. In this Order, the court specifically invited the Petitioners to brief the Twenty-First Amendment issues raised by the prohibition on alcohol, but noted that the parties were free to include all preserved issues in their briefs. *Id.* In their Brief to the Kentucky Supreme Court, Petitioners did address the Twenty-First Amendment issues as requested, as well as all of the other issues previously preserved, again raising and arguing the federal issues presented in this Petition. *See, e.g.*, App. 380, 389-91, 395-98, 403-10, 411-16, 422-28, 435-40, 442-46 (analyzing prior restraint, secondary effects doctrine, time, place, and manner restrictions, alcohol regulation, and general free speech principles under minimum federal constitutional principles, but at times arguing for even greater protection under Kentucky constitutional interpretation); *see also* App. 380 (noting that although Petitioners claims were predicated upon Kentucky Constitution, the analysis is one of federal law because "state rights cannot fall below the minimum guarantees of rights under the United States Constitution.").

On April 22, 2010, the Kentucky Supreme Court issued an Opinion affirming in part, reversing in part, and remanding. App. 1-39. The court determined that all of the restrictions in Chapter 111 were constitutional except for the blanket "no touch" provision, which the court determined was unconstitutionally overbroad in that it forbade lawful, nonsexual, consensual touching. App. 3, 12. Petitioners sought a rehearing before the Kentucky Supreme Court on May 11, 2010, but the Court denied the Petition on August 26, 2010. App. 166-67. In its published Opinion, the Kentucky Supreme Court, like those before it, analyzed Petitioners' claims under federal law, even those claims that were brought under state constitutional law. *See, e.g.*, App. 5 (noting that "[w]hile state courts are free to expand individual rights beyond the federal floor ... we adjudge that on the issue of regulating sexually oriented businesses, the Kentucky Constitution does not grant broader protections than the federal Constitution."); App. 5-20 (analyzing claims presented here under federal standards and applying federal case law). However, as will be argued below, while the Kentucky Supreme Court ostensibly considered and applied the applicable federal law on these matters, its Opinion failed to properly take into account controlling case law of this Court (including, significantly, Justice Kennedy's concurring opinion in *Alameda Books*) and, as such, that Opinion conflicted with much federal case law in these areas.

Accordingly, Petitioners now seek a Writ of Certiorari to resolve these conflicts and bring clarity to this body of law.

REASONS FOR GRANTING THE WRIT

I. THE KENTUCKY SUPREME COURT'S INTERPRETATION OF FEDERAL SECONDARY EFFECTS ANALYSIS MISCONSTRUES THIS COURT'S CONTROLLING PRECEDENT AND IS IN CONFLICT WITH THAT OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND SEVERAL OTHER COURTS, AND, AS SUCH, THIS COURT SHOULD TAKE THIS OPPORTUNITY TO RESOLVE THE CONFLICT AND BRING CLARITY TO THIS CONTENTIOUS, CONFUSING, AND OFT-RECURRING AREA OF CONSTITUTIONAL LAW.

This Court should grant the instant Petition for Writ of Certiorari because the Kentucky Supreme Court Opinion below misconceived and misapplied the secondary effects doctrine, misconstrued the binding precedent of this Court in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), and is in conflict with the decisions of the United States Court of Appeals for the Seventh Circuit and several other courts.

As noted above, the Kentucky Supreme Court, and the lower state courts before it, applied federal precedent and federal case law to Petitioners' claims, even those that were brought under Kentucky state constitutional provisions. This is because, while a state is free to give greater protections under its state constitution, the Supremacy Clause mandates that state constitutional protections cannot fall below the

federal floor, meaning the minimum guarantees of individual rights under corollary provisions of the United States Constitution; and because the Kentucky Supreme Court has determined that "on the issue of regulating sexually oriented businesses, the Kentucky Constitution does not grant broader protections than the federal Constitution." App. 5; *see also, e.g., Elk Horn Coal Corp. v. Cheyenne Resources, Inc.*, 163 S.W.3d 408, 418 (Ky. 2005). As such, the Kentucky Supreme Court's application of federal law was, at least in the abstract, appropriate.

While the Kentucky Supreme Court's decision to analyze Petitioners' claims under federal law was correct, its application of that law under this Court's controlling precedent was improper. Federal interpretation of the First Amendment in the realm of sexually oriented businesses and sexual expression has evolved over the years. In 1986, the United States Supreme Court issued its opinion in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), which declared – for the first time in a majority opinion – that the enactment of zoning ordinances directed at "adult" businesses could be justified by the "secondary effects" of such establishments, and that under such circumstances the constitutionality of those types of laws could be evaluated under intermediate, as opposed to strict, scrutiny. *Id.* at 47. Since that time, attempts by the Supreme Court to further define and refine its "secondary effects doctrine" have resulted in the issuance of a number of plurality decisions: *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) ("*Pap's II*"); and *Alameda Books*, 535 U.S. 425. *Barnes* and *Pap's II* dealt with the question of whether "across-the-board" prohibitions of "public nudity" could

constitutionally be applied to prohibit nude performance dance entertainment, and both *Pap's II* and *Alameda Books* revisited *Renton* and considered the evidentiary standards to be used when applying the secondary effects doctrine.

The pluralities in *Barnes* and *Pap's II* determined that the constitutionality of nudity prohibitions should be evaluated pursuant to the intermediate scrutiny test for "symbolic speech" (*i.e.*, expressive *conduct*) as set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), where the Court held that in order to pass muster under the First Amendment, determinations would have to be made as to: 1) whether the regulation at issue is within the government's constitutional power; 2) whether the regulation furthers an important or substantial governmental interest; 3) whether the governmental interest is unrelated to the suppression of free expression; and 4) whether the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest. *See id.* at 377. And the plurality opinion in *Alameda Books* authored by Justice O'Connor held that in the particular circumstances at issue there, the City of Los Angeles had presented sufficient evidence of a "secondary effects" justification for enacting a zoning ordinance that prohibited "multiple use" adult businesses in order to survive a motion for summary judgment. The case was remanded for a full trial on the merits. 535 U.S. at 443.

Then there is the issue of what level of scrutiny – "strict" or "intermediate" – is to be applied in evaluating the constitutionality of laws which are

enacted to regulate sexual expression.[2] The choice of the level of scrutiny to be applied often, of course, determines the outcome of the constitutional question. *Byram v. United States*, 705 F.2d 1418, 1421 (5th Cir. 1983). As a matter of general federal constitutional principle, it is said that a law which is directed at the *content* of expression is subject to strict scrutiny, while a "content neutral" one is to be evaluated under the lesser demands of intermediate scrutiny. *See, e.g., Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45 (1983). Yet, *Renton* created what lower courts have referred to as a "legal fiction" (*see, e.g., Richland Bookmart, Inc., v. Nichols*, 137 F.3d 435, 440 (6th Cir. 1998)), by ruling that at least in the area of sexual expression, a law which is "*justified*" upon a concern of "secondary effects," even though it may regulate based upon the *content* of the expression, may be *treated* as if it was a content neutral regulation and thus be subject to only intermediate scrutiny. *See Renton*, 475 U.S. at 47-48.

This "legal fiction" crumbled to a certain extent, however, in *Alameda Books*. There, a majority of five Justices – in two separate opinions – concluded that it was inappropriate to continue to refer to these types of laws, which clearly delineate their restrictions predicated upon the *content* of the expression at issue,

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[2] Unlike the standards in *O'Brien*, discussed *supra*, strict scrutiny requires that a law be *necessary* to further a *compelling* state interest, and must be *narrowly drawn* to achieve that end. *Widmar v. Vincent*, 454 U.S. 263, 270 (1981). Under strict scrutiny, narrow tailoring requires that the government choose the "*least restrictive means* to further the articulated interest." *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (emphasis added).

as being "content neutral." *See Alameda Books*, 535 U.S. 425, 457, 464 n.8 (Souter, J., dissenting on behalf of three and four Justices respectively); *id.* at 448 (Kennedy, J., concurring in the judgment) (noting that "[t]hese ordinances are content based and we should call them so"). *See also, e.g. 729, Inc. v. Kenton County Fiscal Court*, 515 F.3d 485, 491 n.2 (6th Cir. 2008).

Justice Kennedy authored a concurring opinion in *Alameda Books* devoted almost exclusively to the standards which are to be applied pursuant to the "narrow tailoring" component of the intermediate scrutiny test (*i.e.*, the fourth prong of *O'Brien*), and in the process developed what has come to be known as the "proportionality test." Justice Kennedy notes that while regulations may constitutionally be utilized to reduce secondary effects, they *cannot* have the consequent effect of also reducing speech or expression related activities:

> In *Renton*, the Court determined that while the material inside adult bookstores and movie theaters is *speech*, the consequent sordidness *outside* is *not*. The challenge is to correct the latter while leaving the former, *as far as possible, untouched*. If a city can decrease the crime and blight associated with certain speech by the traditional exercise of its zoning power, *and at the same time leave the quantity and accessibility of the speech substantially undiminished,* there is no First Amendment objection. This is so even if the measure identifies the problem outside by reference to the speech inside – that is, even if the measure is in that sense content-based. On the other

> hand, *a city may not regulate the secondary effects of speech by suppressing the speech itself.*

Alameda Books, 535 U.S. at 445 (Kennedy, J., concurring) (emphasis added). Specifically, he observed that a regulation can be consistent with the First Amendment "if it is *likely* to cause a *significant decrease* in secondary effects and a *trivial decrease* in the quantity of speech," *id.* at 445 (Kennedy, J., concurring) (emphasis added), and summarized his analysis as follows:

> *A city may not assert that it will reduce secondary effects by reducing speech in the same proportion. On this point, I agree with* [the four Justice dissent authored by] Justice SOUTER.... The rationale of the ordinance must be that it will suppress secondary effects – *and not by suppressing speech*.

Id. at 449-50 (Kennedy, J., concurring) (emphasis and clarification added; citation omitted). Perhaps even more importantly, and certainly more relevant to the specific issues under consideration here, Justice Kennedy further explained that a constitutional analysis directed at these type of regulations must "address *how speech will fare* under the city's ordinance." *Id.* at 450 (emphasis added). These, therefore, are the general standards pursuant to which the Ordinance should have been evaluated in order to determine whether it passes muster under a federal Constitutional analysis.[3]

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[3] In order to determine the binding authority of a plurality Supreme Court decision, courts must apply the test announced in

Marks v. United States, 430 U.S. 188 (1977), which states that "[w]hen a fragmented Court decides a case and no single rationale explaining the results enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." *Id.* at 193 (*citing Gregg v. Georgia*, 428 U.S. 153, 160 n.15 (1976)). Under a *Marks* analysis, all federal courts that have examined this issue, save one, have concluded that Justice Kennedy's concurring opinion represents the constitutional holding of the Court in *Alameda Books*, regardless of the type of legislation at issue. *See, e.g., 729, Inc.*, 515 F.3d at 491 (regulations of "adult" businesses must leave the "quantity and accessibility of speech substantially intact" and may not substantially reduce speech, and acknowledged that "Justice Kennedy's opinion binds us on this point."); *Peek-A-Boo Lounge v. Manatee County*, 337 F.3d 1251, 1269 (11th Cir. 2003) (applying Justice Kennedy's concurring opinion to both zoning and public nudity ordinances); *id.* at 1264 ("Because he concurred in the judgment of the Court on the narrowest grounds, Judge Kennedy's concurrence represents the Court's holding in *Alameda Books* under *Marks*"); *G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631, 637-38 (7th Cir. 2003) (Justice Kennedy's concurrence applying to an alcohol prohibition in places where nude dancing occurs, and to a dancer/patron "buffer zone"); *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460, 465 (7th Cir. 2009) (challenging an adult entertainment establishment licensing and regulatory ordinance); *New Albany DVD, LLC v. City of New Albany*, 581 F.3d 556, 561 (7th Cir. 2009) (challenging locational restrictions on sexually oriented businesses); *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 721-22 (7th Cir. 2003) (challenging ordinance prohibiting the sale, use or consumption of alcohol on the premises of "Sexually Oriented Businesses"); *SOB, Inc. v. County of Benton*, 317 F.3d 856, 861-62 (8th Cir. 2003) (challenging a public indecency ordinance). Only one federal circuit has strayed from this consensus. *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153, 1163-64 (9th Cir. 2003) (concluding, 2 to 1, that Justice Kennedy's proportionality test was only applicable in a zoning context, and was not relevant to whether an Arizona hours-of-operation statute passed constitutional muster under intermediate scrutiny). However, in

Yet, the Kentucky Supreme Court did not even attempt to analyze Chapter 111 using Justice Kennedy's "proportionality" test, which, as noted, requires a court to address "how speech will fare" under the restrictions of the challenged ordinance. *Alameda Books*, 535 U.S. at 445-450 (Kennedy, J., concurring). Instead, the court below simply noted that "many of the issues in this case are controlled by *Jameson*, and *Restaurant Ventures LLC v. Lexington-Fayette Urban County Government*, 60 S.W.3d 572 (Ky. App. 2001), two cases reviewing the constitutionality of local government ordinances regulating sexually oriented adult entertainment businesses." App. 5, 7-8. However, the two Kentucky cases upon which the Kentucky Supreme Court relied in analyzing regulations on adult entertainment businesses did not address Justice Kennedy's proportionality test. In fact, *Restaurant Ventures*, 60 S.W.3d 572, was decided over a year before the Supreme Court issued its opinion in *Alameda Books*. And, although the court in *Commonwealth v. Jameson* ostensibly considered and applied the *Alameda Books* decision in its analysis, *see* 215 S.W.3d 9, 26-27 (Ky. 2006), that court did not undertake an analysis under the proportionality test that is required by Justice Kennedy's concurrence, which was the constitutional holding of *Alameda*.

Thus, nowhere in the Opinion sought to be reviewed here, nor in any of the case law which that court referenced as ostensibly justifying and controlling the Ordinance under consideration *sub*

Arizona v. Stummer, 194 P.3d 1043 (Az. 2008), the Arizona Supreme Court subsequently rejected and criticized the divided-panel decision in *Maricopa County*.

judice, did the Kentucky Supreme Court actually consider whether Metro's interest in reducing secondary effects via Chapter 111 would have the unconstitutional effect of reducing speech in the same proportion. Simply put, the Kentucky Supreme Court failed to undertake the proportionality review mandated by this Court's jurisprudence as set forth in Justice Kennedy's concurring opinion in *Alameda Books*. Because the Opinion of this state court of last resort is in conflict with the relevant decision of this Court, it is respectfully submitted that this Court should grant certiorari in order to clarify and ultimately rectify this impropriety.

In addition to not following this Court's controlling precedent, the Kentucky Supreme Court's application of the secondary effects doctrine was in conflict with that of two recent decisions from the United States Court of Appeals for the Seventh Circuit, *Annex Books*, 581 F.3d 460, and *New Albany DVD*, 581 F.3d 556. Both of these cases are pertinent and significant in that they reaffirm that Petitioners here should have been entitled to litigate their "as applied" challenge to the "secondary effects" justification of Chapter 111. And both of these decisions acknowledged that Justice Kennedy's concurring opinion constituted the holding of the plurality decision of *Alameda Books*, 535 U.S. 425, which holds that secondary effects may not be reduced by curtailing the speech itself. *New Albany DVD*, 581 F.3d at 561; *Annex Books*, 581 F.3d at 465. In the case *sub judice*, by contrast, the Kentucky Supreme Court did not permit Petitioners to litigate their as applied challenge to Metro's secondary effects justification for enacting Chapter 111.

The ordinance at issue in *Annex Books* restricted the hours of operation of adult businesses similar to the provision contained in § 111.18 (although the constitutional analysis employed by the Seventh Circuit is equally applicable to basically all of the Appellants' challenges in this matter). The Seventh Circuit held that:

> None of the studies on which the City relied before enacting the law, and none introduced in this record, concerns that kind of ordinance. Nor do the studies show that an increase in adult businesses' operating hours is associated with more crime; the studies are simply cross-sectional analyses that leave causation up in the air. (In other words, they may show no more than that adult businesses prefer high-crime districts where rents are lower.)

Annex Books, 581 F.3d at 462-63. The Court further found fault with the generic studies presented by the City of Indianapolis, stating that the City "has approached this case by assuming that any empirical study of morals offenses near any kind of adult establishment in any city justifies every possible kind of legal restriction in every city"; and noted that "there must be *evidence*; lawyers' talk is insufficient." *Id.* at 463 (emphasis in original); *see also, e.g., Abilene Retail #30, Inc. v. Dickinson County*, 492 F.3d 1164 (10th Cir. 2007) (precluding government from relying on studies from urban environment to justify its regulation of single adult bookstore located off highway pullout because such a standard "would require complete deference to a local government's reliance on prepackaged secondary effects studies from other jurisdictions to regulate any single sexually oriented

business, of any type, located in any setting" and thus concluding that a material dispute of fact existed sufficient to overcome summary judgment).

The Seventh Circuit in *Annex Books* held that the evidence presented by the plaintiffs' expert and the deficiencies in the studies relied upon by the City "call the City's justifications into question and *require an evidentiary hearing* at which the City must support its ordinance under the intermediate standard of *Alameda Books*." 581 F.3d at 465 (emphasis added). The Court in *Annex Books* points to Justice Kennedy's concurrence in *Alameda Books*, for guidance and recognizes that:

> Justice Kennedy insisted that the benefits (less crime) be compared with the detriments (less speech) and added that a given regulatory system is easier to justify if it works in the same way as the regulation of other, similar, businesses, for then it is harder to conclude that the government has set out to curtail speech because of its subject matter.

Id. This decision makes perfectly clear that Petitioners were entitled to challenge the secondary effects justifications of ordinances regulating adult entertainment businesses, and that the municipalities must set forth actual evidence supporting those justifications, and not simply rely on prepackaged studies and "lawyers' talk." The Kentucky Supreme Court did not permit Petitioners to make such an as applied challenge in the present case.

In *New Albany DVD*, the Seventh Circuit reiterated the burden a municipality must bear in justifying its

regulation of constitutionally protected expression. Relying on the edict in *Alameda Books* that the "municipality's evidence must fairly support the municipality's rationale for its ordinance," and finding that no such evidence was presented in the case before it, the *New Albany DVD* Court noted that:

> New Albany has not supplied evidence that "fairly supports" the idea that adult bookstores located near churches or residences attract thieves who then steal from the local denizens as well as the stores' customers. We don't say that the City will be unable to produce this evidence, *but the lack of good evidence to this effect* in the record – coupled with evidence implying that take-home adult stores do not have adverse secondary effects – *is strong enough to require an evidentiary hearing*. Our opinion in *Annex Books* expands on this reasoning, which need not be repeated here.

New Albany DVD, 581 F.3d at 560 (emphasis added). In addition to the claim that adult businesses engender adverse secondary effects in the form of more thefts, the City there argued that such businesses created pornographic litter. The Seventh Circuit found that the City should have presented evidence that such litter is a serious problem in around adult businesses, *id.* at 560-561, and suggested that the City's restrictions on adult businesses may violate Justice Kennedy's holding in *Alameda Books*:

> [T]he reduction in adverse secondary effects may not be achieved just by curtailing speech. "A city may not assert that it will reduce secondary effects by reducing speech in the

> same proportion." 535 U.S. at 449. New Albany's "litter" justification comes perilously close to this, because the amount of pornographic litter may depend linearly on the volume of adult materials sold. The only way to cut litter by 10% may be to reduce sales by 10%, and such a justification would fail under Justice Kennedy's approach.

Id. at 561.

In contrast to the Seventh Circuit's application of the secondary effects jurisprudence, the Court below did not even permit the Petitioners to meaningfully challenge Metro's justification for its Ordinance, nor take into account Justice Kennedy's "proportionality" test. Instead, the Kentucky Supreme Court simply relied upon previous Kentucky cases that had addressed and upheld similar regulations in order to dismiss Petitioners' claims out of hand. App. 7-8 (noting that the anti-nudity, buffer zone, stage height, and limited hours of operations restrictions in Chapter 111 were similar to those previously upheld in *Jameson* and/or *Restaurant Ventures*, and thus disposing of these claims summarily without permitting Petitioners to challenge or litigate Metro's justifications *in this case*). Indeed, in referencing the previous *Jameson* decision, the Kentucky Supreme Court below stated "[w]e have nothing to add to this analysis and are not inclined to depart from any of the reasoning or conclusions reached" therein. App. 5. In contrast, the Seventh Circuit in *New Albany DVD* summed up its opinion by ordering that the "district court needs to take evidence and apply intermediate scrutiny to New Albany's ordinance." 581 F.3d at 561. The lower courts here likewise were required to receive

evidence and to permit Petitioners to challenge Metro's secondary effects justification for enacting Chapter 111. Regardless of the Kentucky Supreme Court's belief of Petitioners' entitlement to take discovery regarding the secondary effects doctrine, Petitioners should have been afforded the opportunity to actually *litigate* this issue at trial.

Because the state court of last resort below opined that it did not even have to provide Petitioners with such an opportunity, the Opinion of the Kentucky Supreme Court is in conflict with the decisions of the Seventh Circuit regarding this matter. As such, Petitioners submit that this Court should accept review of their Writ of Certiorari and resolve this conflict.

II. THE KENTUCKY SUPREME COURT'S DETERMINATION THAT THE ALCOHOL RESTRICTIONS IN CHAPTER 111 ARE CONSTITUTIONAL CONFLICTS WITH THE RELEVANT DECISION OF THIS COURT IN *44 LIQUORMART, INC. V. RHODE ISLAND.*

Petitioners submit that the Kentucky Supreme Court failed to properly consider and apply this Court's decision in *44 Liquor Mart, Inc. v. Rhode Island*, 517 U.S. 484 (1986), a decision that would have and should have mandated a different outcome in the case *sub judice*. The court below ruled that Chapter 111 does not violate the Twenty-first Amendment by relying on a prior line of cases from this Court, including *City of Newport v. Iacobucci*, 479 U.S. 92 (1986), and *New York State Liquor Comm. v. Bellanca*, 452 U.S. 714 (1981). App. 16-17. These cases previously held that the Twenty-first Amendment

conferred an "added presumption" of validity in favor of alcohol prohibitions and that these types of restrictions trumped competing constitutional considerations, including conduct and expression otherwise protected by the First Amendment. *See, e.g.*, *Iacobucci*, 479 U.S. at 95; *Bellanca*, 452 U.S. at 718. Contrary to these holdings, however, *44 Liquormart*—which was decided *subsequent* to both *Iacoucci* and *Bellanca*—makes clear that the Twenty-first Amendment cannot be used to save an otherwise invalid government restriction. *44 Liquormart*, 517 U.S. at 516 (the Twenty-first Amendment "does not license the States to ignore their obligations under other provisions of the Constitution ... [nor] in any way diminish the force of the Supremacy Clause.... We see no reason why the First Amendment should not also be included in that list.") (citations omitted); *see also id.* at 532-34 (O'Connor, J., concurring in judgment).

Thus, even assuming *arguendo* that Kentucky theoretically delegated to Metro the authority to prohibit alcohol sales in the manner proscribed by the Ordinance, the Ordinance is still not valid as a lawful exercise of police power under the Twenty-first Amendment because under *44 Liquormart*, such a prohibition no longer trumps competing constitutional interests, including Petitioners' straightforward Supremacy Clause argument that § 111.30 of Metro's ordinance is invalid because it violates Petitioners' First Amendment rights, conflicts with § 61 of the Kentucky Constitution, and was not a proper exercise of the state's police powers. In sum, the Kentucky Supreme Court's Opinion suggesting that the Twenty-First Amendment confers an added presumption of validity in favor of alcohol regulations, which thereby trumps Petitioners' interests despite the otherwise

invalid restrictions on Petitioners' First Amendment protections, is in conflict with relevant decisions of this Court in *44 Liquormart*, 517 U.S. 484. To remedy this conflict, certiorari should be granted.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that this Honorable Court grant the instant Petition for a Writ of Certiorari.

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